

STATE OF MICHIGAN
COURT OF APPEALS

MELVYN W. WARREN, JR.,

Plaintiff-Appellant,

v

AETNA CASUALTY & SURETY COMPANY,

Defendant-Appellee.

UNPUBLISHED

March 28, 2000

No. 215045

Ingham County Circuit Court

LC No. 92-707930 NM

Before: McDonald, P.J., Doctoroff and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of defendant's motion for directed verdict. This Court previously reversed the trial court's grant of defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). *Warren v Aetna Casualty & Surety Co*, unpublished opinion per curiam of the Court of Appeals, issued November 28, 1995 (Docket No. 182838). We now affirm.

This is a bad faith insurance claim arising out of defendant's handling of plaintiff's defense in a previous lawsuit. We give a brief overview of the underlying lawsuit only to provide an understanding of the context of this opinion. The plaintiff in the underlying lawsuit was Paula Reeves, an attorney hired by plaintiff and his brother to work for their company, Warren Real Estate Group (WREG). Reeves filed a two-count complaint against plaintiff and WREG. Count one alleged that plaintiff and WREG discriminated against Reeves in violation of the Elliott-Larsen Civil Rights Act and the Federal Civil Rights Act by demoting her and terminating her employment because of her pregnancy. Count two of Reeves' complaint alleged defamation. The defamation claim was based on untrue statements about Reeves allegedly made to the Attorney Grievance Commission (AGC), the Michigan Employment Securities Commission (MESC), and other employees of WREG.

Plaintiff and WREG were insured under an excess indemnity umbrella policy issued by defendant. It is undisputed that the policy did not provide coverage for Reeves' discrimination claim, but arguably provided coverage for the defamation claim. Defendant tendered a defense for both counts of the complaint, hiring the law firm of Foster, Swift, Collins and Coey. This case involves defendant's alleged bad faith in the handling of the defense. Reeves' defamation claim was partially dismissed prior to trial, and eventually was dismissed after Reeves' proofs at trial pursuant to plaintiff's

motion for a directed verdict. The jury in the underlying lawsuit ultimately found for Reeves on the sex discrimination claim and awarded her damages. The total judgment against plaintiff included damages, interest, and attorney fees and costs. The judgment is non-dischargeable in bankruptcy because the jury specifically found malice.

Plaintiff argues the trial court improperly granted defendant's motion for a directed verdict. We disagree.

This Court reviews the trial court's decision on a motion for a directed verdict de novo. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997); *Meagher, supra* at 708. A directed verdict is only appropriate when no factual question exists upon which reasonable minds may differ. *Brisboy v Fireboard Corp*, 429 Mich 540, 549; 418 NW2d 650 (1988); *Meagher, supra* at 708.

The Michigan Supreme Court defined "bad faith" in *Commercial Union Ins Co v Liberty Mutual Ins Co*, 426 Mich 127, 136-137; 393 NW2d 161 (1986):

We define "bad faith" for instructional use in trial courts as arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty.

Good-faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith. Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment. However, because bad faith is a state of mind, there can be bad faith without actual dishonesty or fraud. If the insurer is motivated by selfish purpose or by a desire to protect its own interests at the expense of its insured's interest, bad faith exists, even though the insurer's actions were not actually dishonest or fraudulent.

We find the trial court properly granted defendant's motion for a directed verdict in this case. Plaintiff did not present evidence that justified submitting this case to a jury.

Plaintiff argues he introduced a memo written by his attorney in the underlying lawsuit, Scott Mandel, that raised a question of fact regarding whether defendant interfered with settlement negotiations on the eve of trial. The memo documents a series of phone conversations between Mandel and an employee of defendant and includes a statement that defendant "did not want to settle this case." Plaintiff also claims that defendant's failure to offer to contribute more than \$1,000 to settlement and its failure to become actively involved in settlement negotiations somehow constitutes bad faith. These contentions are without merit. It is undisputed that defendant had no duty to indemnify plaintiff on Reeves' discrimination claim. Defendant was certainly not required to contribute towards the settlement of this claim. Moreover, as the trial court observed, the fact that defendant was only willing to offer a minimal amount toward settlement of Reeves' defamation claim is not evidence of bad faith. There was a good faith belief that this claim was without merit, as evidenced by the trial court's dismissal of this

claim. In addition, defendant properly distinguishes the case that Warren cites regarding an insurance company's duty to negotiate settlements in good faith, *Auman v Federal Ins Co*, 81 Mich App 740; 266 NW2d 457 (1978). This Court's holding in *Auman* does not require the insurance company to become directly involved in settlement negotiations, it merely states the insurance company's duty to act in good faith where it does become involved in achieving settlement. *Id.* at 742.

Plaintiff also claims that the fact that defendant directed Foster Swift to file a motion for summary disposition to have the defamation count, upon which insurance coverage was based, dismissed amounted to bad faith. While it is arguable that this action could be considered bad faith because it shows disregard for the insured's interest of having his defense costs paid by defendant, the fact that the trial court ultimately denied the motion in part and the fact that defendant continued to pay the defense costs renders this a nonevent.

Plaintiff further argues defendant acted in bad faith by not separating the file by assigning coverage issues to one adjuster and assigning the supervision of the litigation to another adjuster. Plaintiff's claim fails to acknowledge that there was never a dispute regarding coverage. Plaintiff himself testified at trial that he understood from the beginning that the policy did not provide coverage for the discrimination count.

Plaintiff next relies on the fact that defendant did not hire or pay for independent counsel for him. Plaintiff complains that "whenever a conflict is identified, an insurer should promptly take steps to insure that the insured is made fully aware of and understands the problem." Plaintiff cites cases from other jurisdictions which have held that the insurer is required to pay for separate counsel at its expense to represent the insured. Plaintiff does not cite any Michigan authority for the proposition that defendant was required to pay for independent counsel in this situation. Moreover, in this case the alleged conflict of interest was clear to the insured from the beginning of the case.

Plaintiff also argues he introduced an internal memorandum from defendant that indicates that defendant believed it was defending the defamation claim, but not the sex discrimination claim, even though it had explicitly assumed the defense of both counts. The trial court correctly recognized that plaintiff did not introduce any evidence regarding how the defense of the sex discrimination count should have been handled and whether there was anything that could have been done differently that would have made a difference in the outcome of the case.

Next, plaintiff claims that the relationship between defendant and Foster Swift was improperly an attorney client relationship. Plaintiff relies on a letter written by a Foster Swift attorney referring to defendant as his client. Plaintiff also relies on letters written by his counsel, hired by defendant, regarding mediation. This claim is also without merit. These letters do not raise a question of fact regarding bad faith.

Finally, plaintiff relies upon an internal memorandum that stated that counsel in the underlying case did a good job defending the case for defendant and that the result achieved was a good one for defendant. This expression of a subjective opinion does not constitute actionable bad faith.

Plaintiff also argues the trial court should not have based its grant of a directed verdict on the wrongful conduct rule. While we agree with plaintiff, we will not reverse on this basis because this Court will not reverse a trial court for reaching the correct result for the wrong reason. *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997).

Affirmed.

/s/ Gary R. McDonald
/s/ Martin M. Doctoroff
/s/ Janet T. Neff